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ABSTRACT

Focusing on the teaching of alternative dispute resolutions at universities, Claudia L. Hale and Leda M. Cooks argue that mediation should be taught primarily as a communication process that involves the joint efforts of mediator and disputants. Teachers of mediation should begin by distinguishing mediation from other forms of dispute resolution, explain the steps of the mediation process, and the need for an impartial mediator. In an article describing the creation of a master's degree program in dispute resolution at Wayne State University, Marvin Zalman explains the difficulties of identifying interested faculty across the disciplines and establishing new courses with limited resources. The curriculum established at Wayne State included eight core courses--Democratic Theory and Conflict Resolution; Roots of Social Conflict; Negotiating Theory and Practice; Neutral Intervention Theory and Practice; Communications, Culture and Conflict; Human Diversity and Human Conflict; Practicum in Dispute Resolution; Seminar in Dispute Resolution. Arguing that teachers in business schools should introduce students to mediation as a way of avoiding legal costs and negative publicity, Elizabeth V. Swenson offers role-playing strategies that illustrate the advantages of mediation to business. Other articles present ideas for teaching law and society courses from a design perspective and for applying the law as a teaching tool in non-law sociology courses. (JD)

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FOCUS on Law Studies

Teaching about law in the liberal arts

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Teaching Dispute Mediation from a Communication Perspective: Exploring the Practice and the Paradoxes

by Claudia L. Hale and Leda M. Cooks

[*Editor's Introduction: This issue contains a special emphasis on alternative forms of dispute resolution. Claudia Hale and Leda Cooks (below) discuss the teaching of mediation at the undergraduate level. Marvin Zalman (page 3) summarizes curriculum development for a master's level dispute resolution program. Elizabeth Swenson (page 4) describes an effective pedagogical strategy for bringing mediation alive to students in larger classes. And I report, on the following page, about ABA activities and resources devoted to alternative dispute resolution.*]

The growth of mediation as a form of alternative dispute resolution within both public and private sectors has brought with it a need to critically examine not only the practice, but the teaching of mediation. Thus far, the examination of teaching has focused primarily on the activity of "credentialing" mediators (note, for example, a recent edition of *Negotiation Journal* – 1993, Volume 9, no. 4 – devoted to the issue of mediator qualification and, more specifically, the *Interim Guidelines for Selecting Mediators*, published by the National Institute for Dispute Resolution). While those debates have been of value, there is a need to expand the focus of discussion in such a way that individuals involved in the practice of teaching are invited to share ideas with each other and collaboratively explore the pedagogy which describes this area.

We approach our roles as educators from our positions as members of the (speech) communication discipline and volunteers within community mediation programs. In our view mediation is, essentially, a communication process. In his or her role, a mediator is asked to enter a situation involving not only issues which are in dispute but an extant relationship with its idiosyncratic culture and pattern of (dysfunctional) communication. As a communication process, dispute mediation privileges the present co-creation of stories. Mediation is, thus, both a creative and a collaborative process involving the joint efforts of mediator and disputants.

The starting point for our thinking about and teaching of mediation exists in a variety of "Standards of Professional Practice" documents subscribed to by such groups as the American Bar Association, the Academy of Family Mediators, the National Association of Social Workers, and the Society of Professionals in Dispute Resolution. These documents seek to describe the ethical practice of dispute mediation. By employing them as our organizing framework, not only do we ensure that we address those areas which professional organizations agree constitute the major concerns or issues affecting the practice of mediation, but we will also make the ethical practice of mediation a fundamental theme in our teaching rather than a single unit positioned at only one point in time during the class.

Virtually all of the standards begin with a preamble, which defines mediation and establishes the core constructs constituting the value system of the mediation process. Characteristically, emphasis is placed on the mediator as a qualified, impartial, third party who guides consenting participants (the disputants) through the process of reaching a mutually satisfactory agreement concerning their dispute. The preambles also assign responsibility to the mediator for providing the disputants with "sufficient" factual information concerning mediation, so that they can make informed decisions concerning their participation. Thus, the starting point for our classes, as defined by the standards documents (if not by common sense), is to distinguish mediation from other forms of dispute resolution.

Whether we are working with undergraduate students, graduate students, or community volunteers, there is one assumption which we have discovered is dangerous – the assumption that students enter the class with a basic understanding of what mediation is, and the ways in which mediation constitutes an *alternative* approach to dispute resolution. We have found that initial class discussions need to focus not only on the pragmatics of what one does as a mediator but on such questions as: Alternative to what? What conditions/realities justify the need for an alternative? and What characteristics serve to define mediation as an alternative?

Perhaps the ideal approach to providing students with a personal understanding of the mediation process would be to preface

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Alternative Dispute Resolution (ADR) at the American Bar Association

The American Bar Association has actively promoted alternative forms of dispute resolution since 1976, when it created a Special Committee on Resolution of Minor Disputes. That committee and its successors have encouraged lawyers to become involved in ADR, while also serving to provide information about programs, activities, and resources.

Through the ABA's encouragement – in particular, the innovative "multi-door courthouse" concept, the number of court-related ADR programs has risen from 150 in 1980 to about 1,200 programs by 1993. In the words of ABA President R. William Ide III, "There is little doubt that the ADR trend will alter the structure of the civil justice system; more importantly, it promises to change fundamentally the way American lawyers think about and practice law."

In response to growing member and public interest in ADR, the ABA in 1993 created a Section of Dispute Resolution. In one of its first actions, the Section gained approval to authorize nonlawyers to join the Section as associate members. This action facilitates the partnership between lawyers and other dispute resolution theorists/practitioners that has developed over the years. To date, more than 5,500 lawyers and other professionals have joined the ADR section as members or associates. The section's 26 committees, which include arbitration, community-based programs, cross-cultural negotiations, ethics, mediation, the ombuds process, private judging, court-annexed programs, and the involvement of women and minorities, provide an overview of the range of ADR issues to be addressed.

The Section publishes and distributes a variety of materials and resource information, including a program directory, bibliography, recent conference reports and proceedings, and several videotapes. For further information, contact the Section of Dispute Resolution at 202/331-2258 or ABA Order Fulfillment at 312/988-5555. A number of other ABA sections and divisions work in the area of alternative dispute resolution, often in cooperation with the Section of Dispute Resolution. For example, the Commission on Public Understanding About the Law is completing a 20-25 minute video on ADR for the general public, to be available in July of 1994. Using dramatizations, news footage, and interviews, this video will show why and how to utilize ADR, especially mediation and arbitration, and describe the benefits.

Finally, in addition to the ABA, a variety of other national organizations provide programs, information and resources in areas of ADR, including the National Institute for Dispute Resolution, the Society of Professionals in Dispute Resolution, and the newly-created National Association for Community Mediation.

Bibliography on Language and Law

The Commission recently published *Language and Law: A Bibliographic Guide to Social Science Research in the U.S.A.* by Judith N. Levi, Department of Linguistics, Northwestern University. This bibliography brings together over 1300 entries, from across the social sciences, concerning the interrelationships of language and the legal system. The entries comprise three major categories:

I. Spoken Language in Legal Settings (Including: Comprehensibility of Jury Instructions, Effects of Language on Eyewitness Memory, and Discourse Analysis of Courtroom Speech)

II. Language as a Subject of the Law (Including: Law and Linguistic Minorities, Language Issues in Consumer Protection, and Free Speech, Symbolic Speech and the First Amendment)

III. Written Language of the Law (Including: Comprehensibility of Written Legal Language, the "Plain English" Movement, and Problems in Interpretation of Legal Documents)

Special sections are devoted to overviews and collections, speech act and semiotic analyses, and forensic linguistics.

The work includes two outlines of the relevant research; the first constitutes the framework according to which all the entries are organized, while the second provides cross-references to individual sections according to linguistic subfields.

A detailed Introduction presents historical background, comments on the development of the field in the last decade, guidelines for using the work, and suggestions for introductory readings. Many individual sections also feature brief editorial comments and suggestions to the reader.

Language and Law (56 pp.) is available for $15.00. (To order, please request an order form.)

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Dispute Resolution Curriculum Development at Wayne State University

by Marvin Zalman

As more universities develop dispute resolution (DR) programs, curricular issues will arise. The experience of the dispute resolution curriculum development process at the College of Urban, Labor and Metropolitan Affairs (CULMA) of Wayne State University (WSU), in fashioning a master's degree program in DR, may also be useful to those engaged in generating undergraduate programs. The WSU effort, which began in the Summer of 1992, had several advantages. The curriculum development group included Dean Sue Marx Smock, Associate Dean Harold Wolman, and Assistant Dean Carlton Maley of CULMA, Fred Pearson, Director of the Center for Peace and Conflict Studies at WSU, two nationally recognized experts in DR, Joseph Stulberg, Chair of the Management Department and Mark Kahn, Professor Emeritus of Economics, and I acted as the project coordinator. Wayne State University was one of sixteen institutions with a DR center established under a grant from the William and Flora Hewlett Foundation. The philosophy of the program on Mediating Theory and Democratic Systems (a joint program under CULMA and the Center for Peace and Conflict Studies) informed the efforts of the development group and provided modest resources. The final asset was a University commitment of a faculty slot for a scholar in dispute resolution who would be the program director.

The major resource limitation that we faced was the inability to hire a full time faculty devoted to teaching and research in DR. As with many new and interdisciplinary areas that do not fit into standard departmental boundary lines, the DR faculty would have to be borrowed from existing departments and courses. This limitation led to a campus-wide search for faculty with an interest in dispute resolution. Several scholars with research interests in DR were identified and included in a directory listing their departments, teaching interests and publications. This "roster" will be useful in creating a DR graduate committee. Of greater importance, the search became an integral part of the entire curriculum design process and led to serendipitous developments in the creation of some courses.

Every curriculum design is a process of fitting an ideal to limited resources. At the outset we faced several constraints. The program was to be limited to 32 credit hours. It should reflect the two theoretical concerns of the program on Mediating Theory and Democratic Systems: (1) a deep concern with diversity and conflict, and (2) a desire to illuminate the insight that DR modalities, such as mediation, reflect democratic norms by empowering disputants, voicing differences, stressing compromise where appropriate, and the like. We insisted that the program have a solid theoretical base and provide courses in DR techniques. We discussed whether the diversity and conflict focus should be highlighted by a separate course or, instead, by ensuring that those concerns be reflected in each core course. Although an introductory course on the history and background of the DR movement was ideal, it gave way to an orientation for incoming students. To the last moment, the issue of whether a basic statistics course should be a core class or a prerequisite was in contention.

An essential part of any curriculum is matching faculty to courses. If a course was essential, we had to be sure that a faculty member was available and interested, and that cooperating departments would see mutual benefit in cross-listing classes. The search for interested faculty became critical. Fortunately for our efforts, Fred Pearson had a long-standing interest in the roots of conflict and will offer the multidisciplinary social science core course on the causes of human conflict. Joseph Stulberg and Mark Kahn had extensive practical and academic experience in the key DR processes of negotiation and mediation. An unexpected and happy result of the canvassing of faculty was the discovery of a strong interest in DR in the Speech and Communications department. As a result, we ultimately included a course on communications and conflict in the core curriculum. A course that reflected our concern for dispute resolution and democratic theory hinged on the ability of a specialist in political theory to see the value of this concept and to develop it beyond a basic idea. At the outset we believed that a "capstone course" and an internship were essential.

The end product of our deliberations was a curriculum design that included eight core courses and three electives. The following core classes were settled on:

Topics in The History of Political Thought: Democratic Theory and Conflict Resolution (cross-listed with Political Science). This course emphasizes modern political thought, the variety in the idea of democracy, and the relationship between democratic processes and the peaceful settling of disputes.

Roots of Social Conflict (a DR course offered through Peace and Conflict Studies). This course examines the causes of human conflict, drawing on psychology, ethology, sociology, sociobiology and political science.

Concepts and Processes of Dispute Resolution I: Negotiating Theory and Practice (cross-listed with Management). This course focuses on the theory and practice of negotiation, types of negotiation strategies, bargaining and democratic theory.

Concepts and Processes of Dispute Resolution II: Neutral Intervention Theory and Practice (DR course offered through Peace and Conflict Studies). This course explores the theory and practice of mediation and other neutral interventions including arbitration, types of mediation (workplace, neighborhood, school, environmental, etc.).

Communications, Culture and Conflict (cross-listed with Speech and Communications). This course examines the way in which communications shape conflict and its resolution.

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An ADR Activity for a Legal Environment Course

by Elizabeth V. Swenson

A fundamental assumption in undergraduate legal studies courses has traditionally been that litigation is used to resolve difficult disputes. Dissatisfaction with this process has increased in recent years. As the costs of litigation have risen and court dockets have become clogged with criminal matters, potential litigants have turned to other methods of dispute resolution. In my Legal Environment of Business course, I feel that it is socially responsible to teach students that civil disputes can often be resolved more quickly, less expensively, and with far less residual ill will, by using alternative methods. In a business setting, the added benefits of retaining a sense of control over the results and avoiding negative publicity are powerful incentives to give mediation or negotiation a try.

This classroom activity incorporates alternative dispute resolution into a legal environment course. The demonstration begins with a short lectured introduction about the differences among arbitration, summary jury trials, negotiation and mediation, and their appropriateness for various types of disputes.

Students then are given the facts of an interesting age discrimination case that is loosely related to one I worked on as a law clerk. In this scenario, Ed, 51 years old, was employed for thirteen years by the Heat-o Corporation as a pilot for a corporate fleet of Lear Jets. His safety record was exemplary. A consulting firm hired by Heat-o management to review their flight operations recommended that a standardized flight checklist be used. Feeling that the checklist compromised safety by distracting the pilot, and that it was also biased in favor of young, inexperienced pilots, Ed refused to use it. After several warnings, his employment with Heat-o was terminated. He was replaced by a 27-year-old man. Ed now threatens to file an age discrimination lawsuit requesting damages and reinstatement. The company position is that pilots must comply with the flight operation safety regulations, and that the age of the pilot is irrelevant to this decision.

The class is divided into groups of two, to negotiate this dispute. In the lecture, steps in the negotiation process, particularly working to identify common interests and to discover creative solutions, have been emphasized. Now they are to be applied to this scenario. In addition to these facts, student negotiators are informed about their respective party's best alternative to a negotiated agreement or "BATNA." (Fisher, Roger and William Ury (1981). *Getting to Yes: Negotiating Agreement Without Giving In.* Houghton Mifflin) One of the students in each group is given additional facts regarding Ed's perspective on the dispute. Ed has often considered the possibility of opening up a skydiving school as a second career. He calculates that an initial investment of $30,000 will get him off the ground, so to speak. He would also like an acknowledgment from Heat-o that he has done a good job and that the safety check list is not as important for experienced pilots as it is for novices. The other student in the pair, representing Heat-o, knows that if this case is litigated, it may cost the corporation upwards of $90,000, considering attorney fees, expenses and lost time from work. (Ed has requested a jury trial, and is an appealing witness).

Students now find their own space and have one-half hour to negotiate, as either Ed or the Heat-o representative. Because I do not want to spend much time on the physical arrangements, I ask students to work with a person sitting next to them, preferably one who is not a close friend. Most students take the role-play very seriously. During this thirty minute period, I attempt to circulate among all of the dyads. But again, due to such a short time, my only purposes are to answer critical questions, to defuse any high levels of anger, and to remind intransigent negotiators of the need to negotiate in good faith.

Students report the success of their negotations. The "Ed" who has gotten a combination of the greatest amount of money and the most recognition is identified, along with the company representative who has been successful in having Ed agree to the least amount of money. These two students, who are furthest apart in their expectations, and fully committed to their positions, are placed in a new negotiating situation in front of the class with the professor, who is experienced at this, as a mediator. It usually is not possible to fully mediate this dispute, but the students, who are interested in seeing their party come out looking good, are very attentive to the strategies that a mediator needs to use to deal with difficult positions. The mediation begins with an explanation to the parties that mediation can decrease costs and adverse publicity while keeping them in charge of the outcome. The ground rules, which stress the importance of good faith during the process, are set forth. If little progress is made in the time allowed, students have still learned the use of mediation in this demonstration.

So many of the decisions regarding this exercise were made to show mediation and negotiation in a short period of time. This is why the dispute in question emphasizes a monetary issue as opposed to one that is primarily interpersonal. I find that a monetary dispute is less emotional and more factual in nature. It is also easier to compromise on the solution, and much simpler to select from the class the employee who has "won" the most and the company which has lost the least.

Student response to this activity has been enthusiastic, for the most part. On an open-ended course evaluation question, many of the participants comment favorably. The major criticism is that the activity is too abbreviated and that the class must quickly move on to another topic. Perhaps this is the result of so much of the course being lecture in format. With so many substantive areas of law to cover in a typical legal environment course, it is often difficult to include much in the way of active learning. This activity/demonstration of negotiation and mediation has been a productive alternative.

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Teaching Dispute Mediation
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any discussions of mediation and the communication dynamics involved by having each student participate as a disputant in a mediation. While this method worked successfully when one of us tried it with an undergraduate conflict management class, pragmatically speaking, such an approach is typically not possible. A more workable technique employs a combination of group discussion (directed at discovering the backgrounds of the students) and either playing a videotape of a mediation or, if possible, conducting a live demonstration which employs the services of an experienced mediator and two student volunteers as the disputants. The class can then be "walked through" the basic stages of the mediation process.

At this point, a variety of issues, defined by the Standards, present themselves for discussion. Logically, one of those topics is the concept of "informed consent." Specifically, students can be challenged to try to define the kinds of information which must be shared with disputants, so that those disputants have a sufficient understanding of what will occur within the mediation process, and so that they can appropriately assess the wisdom of participating in that process. Such a discussion seems a fitting companion to the pragmatic exercise of having students (in groups of 3) "rehearse" the beginning stages (i.e., introductions, establishing groundrules, initial story development) of a mediation.

The ideal of mediation as a voluntary process versus the increasing reality in which disputants arrive at mediation via a court mandate can then be broached. Part of that discussion focuses on any anticipated differences in disputant attitudes and commitment to the mediation process as a product of the disputants' cultures or the circumstances surrounding their selection (voluntary or otherwise) of mediation.

The concepts of mediator impartiality and mediator neutrality are defined and employed as transitions into discussions and role-plays focusing on the story development phase of the mediation process. Through providing feedback to each other as well as critically analyzing videotapes (of their own mediations, other student role plays, or materials available through agencies such as the National Institute for Dispute Resolution), students are challenged to explore the problems and paradoxes which surround the concepts of impartiality and neutrality. Since both of us have been trained in systems that prize joint discussions over private caucuses, our focus at this point is primarily on the communication dynamics characterizing situations in which all relevant parties are present. One exercise which we have been exploring recently is based on videotaped re-enactments of post-divorce child custody/visitation mediations. These particular mediations were distinctive (primarily in a negative sense), because of the long periods of time during which the mediators allowed the disputants to actively engage in conflict with each other. While originally designed as part of a research project, as teachers we are using the re-enactments to explore such issues as (1) when and in what manner should a mediator intervene, (2) to whom should the intervention be addressed, and (3) how should the intervention be languaged. The fact that students disagree with each other on the answers to these questions serves to underscore the challenges involved in maintaining the images of impartiality and neutrality in the eyes of both (all) disputants. With graduate students we also explore more extensively the distinction between impartiality and neutrality which is made in the ABA Standards of Practice, as well as the "paradox of neutrality" described by Rifkin, Millen and Cobb (*Mediation Quarterly*, 1991: Vol. 9, No. 2, pp. 151–164).

We should make the ethical practice of mediation a fundamental theme in our teaching.

As the discussions and role-plays shift focus from story development to solution generation, the concept of mediation as an arena for the promotion of *voluntary*, consensual agreements becomes particularly important. The various Standards of Practice all indicate that any agreement which is reached should be "fair," "equitable," and based on "sufficient information." The meaning of those concepts for the practice of mediation is explored. The Standards also assert that the mediator is responsible for suspending or terminating the communication, if he/she believes that one or more of the parties would be harmed or prejudiced by continuation of the mediation process. That responsibility and its paradoxical positioning of the mediator as decision maker for the disputants is explored. The use of private caucuses is discussed at this time, as are debates concerning the appropriateness and timing of mediator-generated proposals.

The languaging of the mediation agreement is one of the final areas for class "practice." Attention is given to representing the disputants' agreement in language which, ideally, continues to reflect the principles which underlie the practice of mediation. Students are encouraged to construct agreements which do not seek, implicitly or explicitly, to assess blame but, rather, to reflect mutual problem solving and consensual agreement.

In this short summary of our approach to teaching dispute mediation, by necessity, a variety of topics have been neglected, as have the majority of sources which we draw upon. In our comments we have generalized across our teaching of undergraduate students, graduate students, and community volunteers. In the process, we have blurred distinctions which are often not only appropriate but essential to our "successfully" meeting the needs and expectations of our students. Despite these shortcomings, we hope that we have succeeded in providing some measure of understanding with respect to our approach to dispute mediation. Above all, we attempt to maintain a focus on the communicative accomplishment of this alternative approach to dispute resolution. We seek to acquaint our students with the strategies and tactics which are available to mediators and which characterize the communications of the disputants. Equally or more important, we try to engage our students in a *critical examination* of the paradoxes underlying mediation and the challenges facing individuals who wish to assume the role of dispute mediator.

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The Design Perspective in the Teaching of Law and Society Courses

by Lawrence B. Radine

The design of law is a subject for which sociological perspectives can be extraordinarily valuable. Yet the design of law is a topic that has not received much attention, either from the social sciences or legal scholarship (see Radine, 1987). In teaching law and society courses, the design perspective can provide the driving force of students' experience in learning about the law, as it can combine their career interests with a liberal arts focus.

Students come into the law and society courses that I teach (Sociology of Health Care Law; Mental Health and the Law, as well as aspects of Sociology of Law and the Sociology of Work) interested in learning about the legal environment of the field they hope to enter. At the outset, they are more concerned with finding out how to stay out of trouble once they take up their profession than in how the law functions. But once they learn the method that I summarize below, they find it an important device for learning about any complex organizational and regulatory situation.

The term design, as I use it here, is drawn from engineering, architecture, and systems thinking. These disciplines share a fundamental fact: all are "sciences of the artificial" (Simon, 1981). Scientific inquiry into why some bridge designs work better than others, why airplane windows pop out, and similar questions are studies of the creations of humans, of disciplines; in other words, they are not studies of the natural world *per se*. A large part of the reason for the study of the artificial, or the man-made, is to improve upon its design. The study of design failure is a major feature of engineering (Petroski, 1985).

Lawmaking is equally artificial in the sense I am using the term here. What, then, are some of the features, or elements, of design in law?

Mental health law provides an unusually clear example of design because most of it was created virtually at one time and out of a unified theory of how a proper mental hospital should function, why it does not and what it takes to change it. These are conceptual models, and all design is based on models, however implicit. Mental health law typically operates through a statewide mental health recipient rights protection organization, which has a field staff of advocates inside each state hospital who accept complaints, determine whether the hospital staff or policies violated the patient's rights code, and negotiate a change in practices with the facility superintendent. The permanently situated field staff structure is an element of this design of mental health law; the practice of negotiating changes (rather than, say, issuing a citation or denying a license) is another characteristic of the design, and operating through the medium of complaints is yet another feature. The list of patients' rights (or offenses) in the code parallels professional practice ethical standards; creating cultural homology was a design decision made by the lawmakers. All of this, taken together, constitute the design of mental health law.

The design perspective can combine students' career interests with a liberal arts focus.

The features of the design of laws that control organizations and professions are similar to the established subject matter of the social sciences. For example, organization theory includes such concepts as culture, structure, and the relation between organization and environment. Through approaching the law from a design perspective, the social sciences are well suited to contribute to an understanding of the functioning of law and its improvement.

The undergraduate level is a good place to begin the study of law from a design point of view, as undergraduates may already be taking social science courses that expose them to these issues. And if, after graduation, students become administrators or policy analysts, say in the insurance industry, they may actually be writing regulations and standards that have similar effects as laws. A design perspective could be useful for these students, since it would teach them to look beyond rules to the way rules are experienced by those who have to comply with them. If the students eventually become involved in lawmaking itself, as legislative aides, legislators, or attorneys, familiarity with this approach would also clearly be important. As citizens, too, they may want to be able to think more systematically about the law.

How to Teach the Design of Law

In subjects like the Sociology of Health Care Law or Mental Health and the Law, there is no text that teaches design concepts, so students learn design thinking in two ways: from lectures and from their own focused research. In Mental Health and the Law, the readings consist of a coursepack of court opinions (e.g., *Wyatt v. Stickney*; *In Re "B", Appeal of Dr. Loren Roth*; *United States v. Freeman*; and *O'Connor v. Donaldson*), a few statute sections, and a few key articles ("On Being Sane in Insane Places" and "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom."). I also use a monograph or two, such as *Asylums* (Goffman, 1961) or, for contrasts with my views, *Madness in the Streets* (Isaac and Armat, 1990). In the Sociology of Health Care Law, the legal basis is far broader, so I use a comprehensive textbook – Southwick's *The Law of Hospital and Health Care Administration*.

My use of these materials is analogous to the way an art history instructor uses slides of art work in class. They are intended as material to analyze, rather than as final conclusions. For example, when I explain the concept of culture, I first describe the fundamentals of culture, including language, stories, and more formal codes, and then the strains within culture, using some of the pollution concepts developed by Mary Douglas and others. I use the recipient rights chapter of the Michigan Mental Health Code as a text for analysis. Why are patients now called

recipients? What does this change in terminology connote? What is the significance, in terms of definitions of deviance, of an entire chapter of a code that sets forth the possible misconduct of *caregivers*, rather than the mentally ill themselves?

In lectures, students begin their understanding of the design perspective by looking at the design challenges posed by each area that lawmakers propose to control. If law seeks to change an organization or industry in a direction divergent from the organization's own goals (affirmative action employment law might be an example), it faces a greater challenge than if it were trying to affirm the industry's own higher principles (as is the case of corporate law). Laws that cover a wide range of behavior, or a diverse set of offices and departments (like patients' rights or the quasi-legal requirements of hospital accreditation) face much more difficult compliance and enforcement issues than do laws that seek to control a narrow range of corporate action. Laws that intrude into private or subtle aspects of relationships, like confidentiality requirements or treatment suited to condition standards, face special problems of detection and compliance.

How Students Research the Design of Law

There is no substitute for visiting and observing corporations and regulatory agencies to see, first-hand, the effects of the design of law. Students write two papers for my courses, one based on library research and a second based on field research. From a detailed assignment guide, students select a legal topic of interest to them – e.g., informed consent, the insanity defense, or capital expenditure regulation. Students also select a profession or organization for study – e.g., a nursing home, a risk management director in a hospital, a prosecuting attorney, etc.

At this point, students learn about both the profession and the related legal areas. They find out about the profession through locating what I call the "information infrastructure," that is, the association that serves the profession, along with its newsletters or glossy magazines. Regrettably, many of these materials are not often found in a university research library. Using *Encyclopedia of Associations*, and *Ulrich's International Periodicals Directory*, one can identify the professional association of interest and then determine that association's publications list. Armed with this information, a student can see if the appropriate journal may be found in a specialized library, such as a professional school's library, an organization's (like a hospital) library, or perhaps in an individual professional's office library. The search process itself helps to acquaint students with their future field.

Developing some expertise about the legal areas is typically not difficult. Students can read ahead in the course materials and study the citations, so as to develop more depth of understanding of the legal standards and their applications. Finally, students study how the particular profession copes with the law, or, in the case of a regulatory agency, how it copes with having to administer the law. This is the most imaginative, and the most sociological, part of the first paper. The papers conclude with the interview questionnaires that serve as the basis for the second paper. Students learn to write questions that are concrete, experience based, and tied to the interviewee's cases or projects. They learn to recognize and avoid writing questions that are vague, speculative, insulting, or impossible to answer.

Students are initially apprehensive about how they will manage to conduct an interview with a professional, but they soon learn that they will be taken seriously indeed. The interview is designed to last for about 45 minutes, but some students develop such rapport and enthusiasm that they go on for two hours. Students have received job offers, internship opportunities, and various other career contacts from this experience. For many, this project becomes one of their most important college experiences.

The second paper is based upon the results of these interviews. Some students find a response to a single question or set of questions so surprising or intriguing that they write their entire paper from these findings alone. Others find the interview almost writes the papers for them, but the second paper is not a mere narrative, to the order of, "I asked...," "she answered...." It is, instead, a test of the ideas set forth in the first paper, and it provides answers to the questions of design that they had explored earlier.

Once students develop the perspective seeing the design of law, and learn how to assess it by looking for unintended effects, sociological overbreadth, shifts in power, new coalitions, changes in organizational rigidity or innovativeness, and transformations in office culture, this perspective becomes a permanent part of the way students come to understand the law.

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From the Trenches in the Field: Serious Observations on the Lighter Side

by Marcia R. Steinbock

[*Editors Note: This article is reprinted from The May/June 1992 issue of* Experiential Education, *published by The National Society for Experiential Education, 3507 Haworth Drive, Suite 207, Raleigh, NC 27609-7229, telephone: (919) 787-3263.*]

Four-year liberal arts colleges are less likely to offer service-learning courses to students who are not majoring in a professional or pre-professional discipline such as social work, criminal justice, psychology, or law. Although these disciplines do offer field courses, they entail the practical application of professional skills relevant to specialized fields of study. Moreover, course enrollment usually consists of majors in those disciplines who have a common conceptual knowledge base. Why not expand upon this concept and have an interdisciplinary service-learning course? Homelessness, as the "presenting condition" observed, can become a launching pad for learning about poverty, conducting social science field research, and acquainting students with poverty law practice. What an ideal context for faculty and student research projects!

The birth of this idea began when Stockton State College provided a research grant to the author for a study of homeless women and children housed in emergency shelters in Atlantic City, New Jersey. Student participation in the research project was a wonderful learning experience but became a logistical nightmare of coordinating everyone's schedules, training student interviewers and, most critically, communicating among ourselves about problems in the field. Result: The development of "Homelessness and Poverty Law," a field course which students now elect as part of their general studies education requirement. Course time is evenly divided between field experiences and the classroom. All students work at the Atlantic City Rescue Mission. Some students put in additional time at Cape Atlantic Legal Services working with attorneys involved in landlord-tenant or welfare rights litigation. Based on this exposure, students raise research questions which they develop as their final class project. Now that the course is being taught for the second time, some observations can be made and questions, not all answered to date, can be asked.

"I'm not one of them."

As part of a series of consciousness-raising exercises, students are required to apply for welfare. Assuming that none of the students actually qualify, they are nevertheless expected to ascertain what their complete welfare benefits would be were they to qualify and, of course, to be honest throughout the application process. Students must also compute the hypothetical public transportation and telephone costs incurred in the process, since poor people rarely own a car and telephone. Finally, they are asked to prepare a budget within the welfare grant including whatever items are necessary to sustain their desired life style.

Students learned about themselves, each other, and homeless people in Atlantic City.

Initially, upon hearing the welfare assignment, student reactions ranged from disbelief to fear. Some reported waiting in their cars for a long time before getting up sufficient courage to enter the welfare office. Others were afraid to tell their families. Yet, they all managed to do it. And, interesting things happened on the way back from the welfare office. One student actually qualified for food stamps, albeit a minimal amount. Her reaction? "I don't need the $10 a month. What difference would it make anyway?" Another student received a phone call. "We hear that you are on welfare!" News travels fast in a small town. In his attempt to explain himself to his chastising neighbors, this prosperous student was made to feel that being on welfare was a crime. Rather than becoming incensed and blaming the poor for his problems, however, he identified with people on welfare, defended them to his neighbors, and learned as he could have in no other way. Finally, all of the students were frustrated with their inability to budget their needs within the welfare grant. Although the barrier between "them and us" remained, it was a thinner barrier than before the exercise.

"I don't do windows."

When does a lesson in humility become more degrading than humbling? Striking the delicate balance between viewing the shelter for people who are homeless as a field for social science observation and as an opportunity for community service isn't easy. None of the students were prepared for some of the assignments which shelter personnel perceived as appropriate areas for college-student volunteers. "I don't like to clean my *own* house, why do I have to help them scrub down walls and fumigate rooms? That's not a learning experience!" Ouch! Not a learning experience? What is learning? When do we learn? And perhaps most importantly, *how* do we learn? Through subsequent class discussions it became apparent that students *were* indeed learning! At the very least, they were raising the right questions. Moreover, as time passed they were learning something about themselves, each other and the people who are homeless in Atlantic City.

"I still don't know what I'm going to do for my final project."

Students must raise a research question based on their experience and then proceed to answer that question by using their

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The Law as a Teaching Tool in Non-Law Sociology Courses

by Jean Bacon

As a professor of Sociology, I teach an undergraduate course called "The Construction of Social Problems," the aim of which is to teach students that what we as a society think of as "social problems" are in fact actively constructed or identified from a much broader range of social conditions which are detrimental to individuals or to society as a whole. Social problems are not just "out there," society must play an active role in their creation. The first time I taught this course, during a discussion of abortion, I found that the students lacked any understanding of the legal concepts underlying the debate over the Supreme Court's decision in *Roe v. Wade*, such as "due process" or "strict scrutiny." While the courts and the legal profession have obviously played a role every bit as important as that of political and religious activists, the media, government officials or "public opinion" in framing society's discussion of this and other contemporary social issues, law and legal concepts remain alien to most students. The likelihood that students will graduate college without having acquired even a cursory exposure to the different branches of legal study and their operative principles is an inexcusable lacuna in the cultural and social literacy which is the goal of a liberal arts education.

A primary reason for this lack of exposure to legal concepts is their segregation in the curriculum to specific courses devoted to the law. Sociology courses incorporate references to history, economics, literature and other disciplines into the syllabus. However, discussions of tort, property, contract and constitutional law seldom if ever make an appearance. The absence of law in an undergraduate education distorts the student's perception of his or her society. The scant exposure that students receive to law and legal analysis during their course work bears an inverse relationship to the importance that the law plays and will continue to play in their lives.

Not only does lack of awareness of legal issues hinder students' general preparation for active participation in the world of affairs, it also inhibits my ability as an instructor to treat the law as a fundamental social institution integral to an exploration of basic sociological problems. Whether one is teaching about social problems, race and ethnicity, the nature of community, deviance and crime or other standard areas of sociological inquiry which involve public policy and public opinion, the law is as much a participant in social processes which constitute these phenomena as any other institution. I suggest, then, that we must begin to teach about the law in general terms in order to both prepare students for active lives as citizens, and to enrich our own sociological treatments of core social phenomena.

There are a number of different types of materials which can be assigned to students to raise legal issues for general sociological analysis. Many books written for a lay audience discuss in a lively manner landmark cases in American jurisprudence (Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, Free Press, 1988) or the process of legal reasoning and judicial negotiations which produce these landmark decisions (Kim Isaac Eisler, *A Justice for All: William Brennan, Jr. and the Decisions that Transformed America*, Simon & Schuster, 1993). Judicial opinions themselves, published in *United States Reports* or *Supreme Court Reporter*, often make excellent primary materials for students to analyze. Case books used to teach in law schools include, in addition to the cases themselves, short hypothetical problems which test students' ability to pick apart the different legal issues and principles which render seemingly simple cases complex.

We must teach about law to enrich our treatment of core social phenomena.

Using particular cases or legal issues as fodder for sociological analysis requires that students have some basic knowledge of legal concepts. With financial support from the ABA Commission on College and University Legal Studies, I have prepared a twenty page introduction to Constitutional Law which is available from the American Sociological Association Teaching Resource Center (1722 N Street NW, Washington, DC 20036; $5.50 for ASA members, $7.50 for non-members. This packet of materials also includes a bibliography and description of important cases to assist faculty in choosing legal cases and issues for classroom use). David P. Currie's *The Constitution of the United States: A Primer for the People* (University of Chicago Press, 1988) is also a nice short introduction. Brief introductions to other areas of law that are accessible to non-lawyers are rarer, and I am continuing to work on developing appropriate materials comparable to those on Constitutional law.

In addition to using *Roe v. Wade* to discuss the law's contribution to the construction of abortion as a social problem, in a course on "Language and Society" I have also used the speech codes on university campuses as a way to illuminate the role which language plays in building communities. In socio-linguistics, we often talk about "speech communities" and see that common modes of expression provide a fundamental type of social connection. In the speech codes controversy, we see in some cases the promotion of standards of expression as a deliberate attempt to foster community. To raise these issues for students I combine a report of a particular speech code incident (such as the University of Pennsylvania incident involving the "water buffalo" epithet directed at a group of black female students, see *The New York Times* 5/15/93 p.A6, 5/25/93 p. A10), with a "model" speech code (Thomas Grey, "Responding to Abusive Speech on Campus: A Model Statute", *Reconstruction*, Winter 1990, pp. 50–54), and some background reading on First Amendment jurisprudence (free speech), as well as the Fourteenth Amendment (suggesting that speech codes may also be seen as an equal protection issue).

I've used examples from Casner & Leach, *Cases and Materials on Property Law*, a casebook on property law to encourage

students to think about the way common law rules governing personal property derive from basic beliefs and values which underpin our society's more broadly defined interactions with material possessions. In a course entitled "Property: A Social Analysis of Material Goods," students discussed legal notions of "possession" and "ownership" of personal property in light of other aspects of people's relationship with material objects raised in other units in the course. They were able to see, for example, the connection between certain legal bases for ownership such as adverse possession and the Lockean idea that human labor is the basis of all property. Similarly, they were able to see important connections between property law and the geography of property. We had discussed the way that material goods can serve as a marker of ownership of space. A stack of books, a newspaper, or a coat left on a long table at a library are as effective at deterring fellow patrons from choosing a place at the table as one's actual presence. Similarly the location of objects has ramifications for rights of ownership in legal terms. A hotel worker who finds a brooch on the floor has rights against all but the true owner. If instead she finds it left in a dresser drawer, the hotel's claim is stronger than the worker's.

These examples should illustrate the varied contexts in which legal issues can be used to illuminate sociological issues beyond the sociology of law. Incorporating legal issues into general sociology courses allows us to argue that the law is a social actor which shares many characteristics with the other social actors shaping our world. The law raises the same questions concerning the connection between individual action and institutional action which lie at the root of the discipline of sociology. In addition to analyzing the law as a distinct social institution (the sociology of law approach), we also need to show our students the way the law, along with the economy, the government, the media, etc., contributes to the contours of our collective life, and that the law as a social institution is not separate or special, but is intimately linked to the beliefs and values which underpin all the various social institutions and everyday social practices that constitute a particular society.

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Dispute Resolution Curriculum
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Human Diversity and Human Conflict (DR/CULMA). This course examines how conflict and its resolution is affected by racial, ethnic, gender, class and generational differences.

Practicum in Dispute Resolution (DR/CULMA) is a guided field placement to ensure an experiential component in the student's education.

Seminar in Dispute Resolution (DR/CULMA). This is a "capstone seminar" taken in the final year; it requires a major paper.

A critical part of the curriculum development process was a series of "course development seminars." Conducted in two-hour blocks on successive weeks, the seminars had several goals. One was to stimulate faculty to develop course outlines at an early date. These seminars gave the instructors an opportunity to place pedagogical materials into their appropriate intellectual contexts. By providing a critical audience of fellow instructors and interested faculty, the seminar encouraged the instructors to think about their intellectual grasp of the subject in relation to available materials and pedagogical approaches. Finally, this was a structured opportunity to get the interdisciplinary faculty to interact, share ideas, learn about alternate approaches to DR, raise questions about overlap and compatibility, and to begin to act as a more integrated faculty rather than as diverse instructors. Seminar discussions ranged from practical questions about course design to probes about the intellectual foundations of the presenters' ideas. This entire process, I believe, assisted the College in moving toward an integrated and high quality Dispute Resolution curriculum and program in an interdisciplinary, multi-departmental context.

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From the Trenches in the Field
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field experience as a resource. Academic diversity now becomes an asset rather than a liability. By viewing the shelter through both the window and the microscope of their discipline, students develop and answer their own research question. "What access do the homeless have to emergency and preventive health services in the shelter and in the community?" asked a public health student. "What environmental health problems might exist within the shelter itself?" asked an environmental studies major. "What is the political background of legislation related to homelessness?" asked a political science major. "What about substance abuse and criminality?" queried a criminal justice student. "Can photographs of the shelter be a research project?" asked a photography major. And so on. The field, rather than the library, now becomes their stomping ground for creating diversified projects.

"That wasn't my experience."

Finally, after weeks of struggling against their own resistance to learning in this way and overcoming the logistical twists and turns of the field, students have an experiential database on which to graft conceptual classroom material. Student discussions now take on an exciting new dimension. There is an alertness, a confidence when speaking about *their* work, *their* observations. What a difference this is from that first day. As zeal replaces apathy, however, students still need to learn that their own new experiences, their own new observations, may still not be the universal truth, and therefore must be subjected to even more critical thinking. Myopic generalizations about "reality," whether in the arena of scholarly activity or as a result of less structured observations, must remain tentative hypotheses awaiting rigorous verification rather than automatically becoming premature conclusions.

Conclusion.

"They're just people. It just isn't right that people in our society should be forced to live the way they do." This one observation is finally made by most students, sooner or later. And that, after all, is one observation that we may not wish to challenge because it is the beginning, not the end, of their learning.

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The Supreme Court and American Democracy
by David G. Barnum
New York: St. Martin's Press, 1993
348 pp., $39.95 (cloth).

The Supreme Court and Legal Change: Abortion and the Death Penalty
by Lee Epstein and Joseph F. Kobylka
Chapel Hill: University of North Carolina Press, 1992
417 pp., $45.00 (cloth); $16.95 (paper).

Reviewed by Timothy J. O'Neill

As an unrepentant voyeur, I visit college bookstores to see what my colleagues assign in their courses. With few exceptions, constitutional law courses (however titled) require heavy, expensive, intimidating case books. Law and politics courses seem more eclectic, with textbooks fighting with trade books and readers for shelf space. Yet when I enter the classrooms for these courses, the students are armed with yellow legal pads. Like it or not, students think that undergraduate studies of law prepare them to be lawyers. Must we (can we) be more than molders of baby lawyers?

This is the dilemma of teaching about law in a non-law school context. To what extent should we approach the "law" as a coherent universe of its own, moved by a dynamic and logic internal to it, or, to switch metaphors, should we approach it as flotsam in a swiftly flowing river, battered by other pieces of flotsam and partially if not wholly submerged in the great stream of politics as power? David Barnum's The Supreme Court and American Democracy and Lee Epstein and Joseph Kobylka's The Supreme Court and Legal Change demonstrate that this is a false dichotomy.

Barnum tackles the thoughtful challenges to the idea of a legal institution exercising political power and policy choice. He demonstrates that judicial power can be reconciled with what he characterizes as the touchstone of a constitutional democracy: accountability of public officials to the people. (Others might prefer to think of the consent of the governed as genuine only when it is self-preserving and well informed.) The story he weaves, for all good teachers tell stories that have a point to them, melds history with politics, legal principles with personalities. The reader learns about the relative effectiveness of internal and external political checks on the Court, about the Court's responsiveness to trends in public opinion, and about the Constitution as a set of first principles which may justify judges resisting majoritarian demands. Barnum's exposition is even handed, although his concentration on the Supreme Court is problematic, and while he ends siding with those who celebrate the Court as a salutary check on untutored democracy, the counterarguments are nevertheless well represented.

Epstein and Kobylka take their bearings from Justice Holmes' often repeated but often misunderstood aphorism, "the life of the law has not been logic: it has been experience." They stress how this aphorism is at the core of most social science explanations of judicial policy making, how an undue emphasis on experience belittles the role of logic, and how, as with Holmes, we should come to the conclusion that the life of the law is legal logic *and* shared experience.

Focusing on the abortion and death penalty cases, Epstein and Kobylka explore why judges change their minds, and therefore why specific arguments and parties win in one era and lose in another. Their case studies are exhaustive, rich in detail, revealing a sagacious grasp of the pertinent literature, while respectful of the broader goals these case studies are enlisted to achieve.

Epstein and Kobylka analyze the relative influences of personnel changes on the Court, the political environment within which the legal issue first arose, how the case may be affected by and in turn affects its environment, and the role of advocacy groups with their specific motivations, resources, tactical decisions, and actions. The authors use these factors and the actual legal arguments and principles to explore why some things happened and other things did not. Somewhat to their surprise, Epstein and Kobylka discover that law and legal argument were the key motive powers; other factors are important but not as important. They recapture the insight that this is legal change through legal mechanisms, and therefore the politics of judicial policy making is not coincident with the politics of the legislature or the politics of the bureaucracy or mass mobilization.

In both cases, the initial winners found themselves facing defeat because of what Epstein and Kobylka call the "tyranny of absolutes," a kind of ideological and tactical blindness which caused the movements to fail to adapt to the changing membership of the Court and to shifting arguments and perspectives. Persuaded that their cause was just and that the initial victories would withstand any assault so long as they stood by their premises, advocacy groups and individuals challenging the death penalty or arguing the individual woman's right to choose were reluctant to forge the accommodations necessary to forestall future reversals. They lost not because the nation turned more conservative. They lost not because conservative presidents appointed justices less sympathetic to their claims. Rather, they lost because new theories, arguments and doctrines converted sitting justices and convinced new justices to accept the opponents' conclusions.

Epstein and Kobylka do more than recount what happened and why. They offer suggestions about alternative tactics or arguments that could have been pursued more successfully. The reader listens in on the thoughts of two skilled tacticians who not only show how the American legal system operates but also how to act effectively within it.

Both Barnum's and Epstein and Kobylka's interpretations are open to criticisms, but I found this to be an asset, not a liability. Good teaching requires more than one "voice" in the classroom. When only one voice is heard, no thinking is going on in the classroom. Many students are only beginning to cultivate the knowledge and rhetorical skills necessary to formulate their own well considered and supported responses. "Expert voices" such as those of Barnum, Epstein and Kobylka make the classroom experience a genuine conversation.

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Courseware on the Federal Court System

by Micheal W. Giles

During the more than twenty years I have taught law-related courses to undergraduates, I have consistently experienced a tension between the need to introduce students to the structure and processes of legal institutions and the desire to introduce them to the broader themes which link the study of law to the liberal arts. Obviously, both of these subjects are important. We can scarcely count our work as teachers fulfilled if students complete their coursework without some understanding of the institutional structure of the legal system. On the other hand, the ability to trace the federal court structure from the District Courts to the Court of Appeals to the Supreme Court is relatively sterile knowledge without an idea of the role which courts have played in American political life.

While we can agree that students need to be introduced both to the structure and the processes of the legal system and to the broader value themes which it subsumes, a tension arises in implementing this goal within the reality of a finite amount of classroom time. One approach to alleviating this tension is to place greater responsibility on students to acquire information outside of the classroom setting. Traditionally, this has been accomplished through assigned readings. With support from the ABA Commission on College and University Legal Studies and from the Information and Technology Division of Emory University, I developed, along with John Hermann, computer courseware designed to provide an out-of-class review of the federal court system.

The courseware covers two topics. First, it provides an overview of the history and development of the federal courts. This section draws directly on Russell Wheeler and Cynthia Harrison's "Creating the Federal Judicial System," a 1989 publication of the Federal Judicial Center. A series of historical maps of the structure of federal courts are presented with textual information available to the student on request. Second, the courseware provides a brief description of each type of court in the federal system. A diagram of the court structure is provided, and students are able to obtain detail on each court by clicking on the court's position in the structure.

Courseware can be obtained by writing me at the Department of Political Science, Emory University, Atlanta, GA 30322 or electronically at POLSMG@EMUVM1. There is no charge to receive a copy. The courseware can be duplicated by the user for use in conjunction with a class. Users are requested to send suggestions for additions and/or enhancements as well as to report any glitches they encounter. The courseware runs on Apple Macintosh equipment and requires the user to either have Hypercard or Hypercard Reader installed. The Hypercard stack requires 644K of storage space.

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Teaching about Law in the Undergraduate Curriculum: The Contribution of Political Science. [published in the APSA's Law, Courts and Judicial Process Section Newsletter, Summer, 1985]. No charge.

Law, Liberal Education and the Undergraduate Curriculum. [published in Legal Studies Forum, Vol. 10, No. 1, 1986]. No charge.

Directory of Undergraduate Programs of Legal Studies, Law and Society, Etc.; 3rd Edition, 1993. No charge for single copies.

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